

IN THE SUPREME COURT OF THE STATE OF MONTANA

Number DA 10-0122

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T.G.C. and M.C.,

Petitioners and Appellees,

v.

M.C.M.,

Respondent and Appellant

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**ANSWER BRIEF OF APPELLEE**

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On Appeal From  
Montana First Judicial District Court, Lewis & Clark County  
Before the Honorable Jeffery M. Sherlock

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APPEARANCES:

Lori A. Harshbarger  
JD Law Firm, P.K.  
336 Waterloo Road  
Whitehall, MT 59759  
Ph: (406) 287-7933  
Fax: (406) 287-3175  
Email: [jdlawfirm@msn.com](mailto:jdlawfirm@msn.com)

Charles A. Smith  
Attorney at Law  
1 N. Last Chance Gulch  
Helena, MT 59601  
Ph: (406) 442-4840  
Fax: (406) 442-4164  
Email: [sca1010@qwest.net](mailto:sca1010@qwest.net)

Attorney for Respondent-Appellant

Attorney for Petitioner-Appellee

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## STATEMENT OF THE FACTS

Appellant M.C.M. is the biological mother of the two children, M.M.M. and D.M. (Tr, p. 26, ll.12-14). Appellee M.C. is the paternal grandmother of the two children. (Tr. 2, ll.20-22). M.C. has been married to T.G.C. for 20 years. (Tr. p. 24, ll. 1-7.) (Appellant's Opening Brief incorrectly states that M.C. and T.G.C. have been married for 10 years. (Opening Brief of Appellant at 2.)) T.G.C. is M.C.'s second husband and is not the paternal grandfather of the children. (Tr. p.2, ll. 8-22). M.C. resides in Boulder, Montana and has been employed with the Public Health Department of the State of Montana for the last 10 years. (Tr. p.1, line 25; p.2 ll.3-9). The minor child M.M.M. is 10 years old, and D.M. is 8 years old. (Tr. p.2, line 25).

In July of 2007, M.C. M. and the child's biological father, R.M., who is M.C.'s son, were divorced, and M.M. and R.M. came before Honorable Judge Sherlock for dissolution of their marriage. As part of the Dissolution Decree, the District Court awarded M.C. legal guardianship over the children because the Court found that neither M.C.M. nor R.M. was fit to parent the children (M.C.M. had a serious drug problem) and both M.C.M. and R.M. agreed that it was appropriate to award guardianship to M.C. (Tr. p. 11, ll. 18-25; p. 12, ll. 1-2; p.29, ll. 2-10). At the same time, the District Court ordered that either M.C.M. or R.M. could, within one year of the Dissolution Decree, petition the Court to regain

custody of the children. (Ex A, Decree of Dissolution, July 3, 2007). The District Court also ordered that M.C.M. and R.M. each contribute 50% of the children's health expenses and each contribute such additional funds as they were able for the care and upbringing of the children. (Ex A, Decree of Dissolution, July 3, 2007, p. 3). It is undisputed that M.C.M never filed a petition to regain custody (Ex. C, Order terminating parental rights, January 2, 2010, p.2) and never paid any child support pursuant to the Decree despite holding jobs (Tr. p. 18, ll. 23-25, p. 19, ll. 1-3).

In 2002, the children resided with M.C. and T.G.C. for the entire year, except for about one month when M.C.M. had them at her home. (Tr. p.3, ll. 18-25; p. 4, ll. 1-4).

In 2003 and 2004, M.C. and T.G.C. had the children for most of the year except for about one month each year when M.C.M. took them, then "brought them back again" each time. (Tr. p. 4, ll. 7-10, p.4, ll. 1-14).

In 2005, the children resided with M.C. and T.G.C. for all of the year except for about a month between late February and March or April, when M.C.M. took the children to South Carolina so they could meet her biological father. (Tr. p. 5, ll. 4-10; p. 6, ll. 13-23). M.C.M.'s biological father called M.C. and reported that the children "were running up and down the street with no clothes on and no food to eat" and that M.C. should get them back because "the kids were in danger." (Tr. 6,

ll.13-25; p. 7, ll. 1-3). Also, in 2005 M.C.M. went to the hospital in Missoula for mental health treatment and to a women's abuse center in Great Falls. (Tr. p. 5, ll. 15-18; p. 6, ll. 4-6).

In 2005 M.C. and T.G.C. purchased a four-bedroom house in Boulder Montana so that the children could each have a room of their own while living with M.C. and T.G.C. (Tr., p.5. ll. 4-7, 23-25; p. 6, ll. 1-2; p. 20, ll. 18-25, p.21, ll. 1-2).

In 2006, the children lived with M.C.M. in Victor, Montana for a short time until M.C.M. asked M.C. to take care of the children again. (Tr. p.7, line 25; Tr. p.8, ll. 13-18; p. 9, line 23). When M.C. and T.G.C. picked the children up in Victor, "the kids were in shorts, and they had no coats, and there was snow on the ground." (Tr. p. 9, ll. 19-25). For the remainder of 2006, the children lived with M.C. and T.G.C. (Tr. p. 10, ll. 1-2.).

The children resided with M.C. throughout the rest of 2006 and into early 2007. (Tr. p. 10, ll. 1-2; p.10, ll.3-13).

In mid-February 2007 the children were living with M.C. and T.G.C. when M.C.M. called "and said she had no jobs and no prospects, and the man she was living with, Keith, was leaving her, so she needed the kids back so she could get welfare, that she was tired of the abuse from Keith and welfare was more dependable." (Tr. p. 10, ll. 4-13). So, the children resided with M.C.M. from about mid-February until April 3, 2007(with the exception of a period in early March

when M.C.M. “called and asked [M.C.] to take the kids back again.” (Tr. p. 10, ll. 4-25, p. 11, ll. 1-3). On April 3, 2007 police personally summoned M.C. from work and asked her to pick up the children because M.C.M and Keith had both been arrested for drug possession and child endangerment. (Tr. p. 10, ll. 17-25; p. 11, ll. 1-7). The children have been living continuously with M.C. and T.G.C. ever since.

M.C. has always allowed M.C.M. visitation with the children whenever M.C.M. could manage it. (Tr. p. 12, ll. 3-10).

On July 3, 2007, the District Court entered the Dissolution Decree dissolving the marriage of M.C.M. and R.M. and awarded M.C. permanent legal guardianship of the children, with the condition that M.C.M. [or R.M.] could petition the District Court within one year of July 3, 2007 to regain custody of the children. (Tr. p. 11, ll. 18-25). As noted above, in the Dissolution Decree the Court also ordered that M.C.M. and R.M. each contribute 50% of the children’s medical expenses ( “50 per cent of all medical, dental, optometric, and pharmaceutical expenses” ) and each contribute such additional funds as they were able for the care and upbringing of the children. (Ex A, Decree of Dissolution, July 3, 2007, p.3).

On July 21, 2007, M.C.M. called M.C. and told her that she had been using drugs again and charges were going to be filed. (Tr. p. 12, ll. 13-15). She was charged with possession of methadone. (Tr. p. 30, ll. 18-25). M.C.M.’s probation

was revoked on September 17, 2007 for a voluntary UA, for violating a stop sign violation and for not paying her fines in a timely manner. (Tr. p. 12, ll. 16-19; p. 31, ll. 1-5). M.C.M.'s probation officer believed that M.C.M. needed treatment and therefore, revoked her sentence. (Tr. p. 29, ll. 11-17). M.C.M. was sentenced to three years, and was incarcerated from November 2007 until October 2009. In October 2009 she was released on conditional release to the Butte Department of Probation and Parole. M.C.M. testified that while incarcerated, she maintained contact with the children through letters and phone calls. (Tr. p. 33, ll. 3-9).

During that same time frame, M.C.M. spent time at the Elkhorn Treatment Center in Boulder. (Tr. p. 29, l. 23-25). She took a parenting course, CPR 1, 2, and 3, and an SSIC class. M.C.M. also mentored others in those same classes and helped teach DBT to some of the other residents at Elkhorn. (Tr. p. 30, ll. 1-4)

Since October 2009, the children have been spending weekends with M.C.M. (Tr. p. 13, ll. 24-25). When they return to M.C. and T.G.C. from such weekends, they have difficulty doing what they are told by M.C. and T.G.C. (Tr. p. 13, ll. 22-25; p. 14, ll. 1-2). To summarize, from 2002 through the present M.C. and T.G.C. have been, almost exclusively, the primary care givers for the children. (Tr. p. 14, ll. 23-25; p. 15, ll. 1-5). The children, now 8 and 10 years old, have essentially been raised by M.C. and T.G.C. since the children were 2 and 4 years old respectively. (Tr. p. 3, ll. 7-16).

M.C.M. has been employed at the Freeway Tavern as a cook since June 2009. (Tr. p. 14, l. 7; p. 30, ll. 6-7, 9-10). She lives with her boyfriend, John Wambolt, in Butte. (Tr. p. 14, ll. 17-22, p.26, ll. 21-25, p.27, p. 27, line 3). She held various jobs in 2008 and 2009 under the supervision of the Department of Corrections, including jobs at Town Pump, Hampton Inn, and 4-B's. (Tr. p. 14, ll.3-9). In response to the instant Petition filed by M.C. and T.G.C. for the termination of M.C.M.'s parental rights and for the adoption of the children, M.C.M. filed an affidavit with the District Court dated March 23, 2009, in which she stated that she was employed in Butte, earning \$1,200 per month. (Ex. C, Order (terminating parental rights and approving of adoption), January 6, 2010, p. 5). Since the July 2007 when the District Court ordered that M.C. assume legal guardianship over the children and that M.C.M. provide to the children 50% of the children's medical expenses and such additional support as she was able, M.C.M. has, in fact, provided "zero" support, financial or otherwise, to the children. (Tr. p. 18. ll. 22-24, p. 22, ll. 14-19). In fact, since July 2007, M.C.M. has asked M.C. for money several times. (Tr. p.18, ll. 22-25, p.19, line 1),

M.C. and T.G.C. have started the children in baseball and basketball and in piano lessons. (Tr. p. 13, ll. 22-25). T.G.C. testified that he loved the children and wanted to adopt them. (Tr. p. 24, ll. 21-25, p. 25, ll. 1-4). The children are doing well in school, getting mostly A and B grades for mid-quarter, except that each

received a D grade in a project they did not finish. (Tr. p. 16, ll. 6-25, p. 17, ll. 1-13).

M.C.M. believes that the treatment she received at Elkhorn and the courses she took have given her the tools she needed to turn her life around. She testified that she has been clean and sober since November 2, 2007. (Tr. p. 31, ll. 14-17).

M.C.M. introduced into evidence letters of recommendation from people with whom she has worked. (Tr. p. 32, ll. 12-21).

M.C. feels that it is in the children's best interest to stay with her and T.G.C. (Tr. p. 15, ll. 24-25, p. 16, ll. 1-2). M.C. does not believe the children would have a stable life with their mother. (Tr. p. 17, ll. 24-25, p. 18, line 1). At the hearing, M.C. requested permanent custody of the children, or that, if custody was to be given to M.C.M., then the Court place some requirements and guidelines on M.C.M., such as requiring her to have a job and her own home own for six months or a year before taking custody of the children. (Tr. p. 15, ll. 6-14).

The birth father, R.M., who is M.C.'s son, has consented to termination of his parental rights and to the adoption of the children by M.C. and T.G.C.. (Tr. p. 23, line 23).

## STANDARD OF REVIEW

“The District Court is in the best position to hear testimony and evaluate evidence in adoption cases.” *Matter of Adoption of Doe* (1996) 277 Mont. 251, 255, 921 P. 2d 875, 877-878. This Court reviews for abuse of discretion the District Court’s decision to terminate parental rights pursuant to § 42-2-608 MCA. *In re Adoption of R.A.J.*, 2009 MT 22, ¶ 11, 349 Mont. 100, 201 P. 3d 787; *In re A.T.*, 2003 MT 154, ¶ 9, 316 Mont. 255, 70 P.3d 1247. This Court also reviews the District Court’s Decree of adoption for abuse of discretion. See *Matter of Adoption of R.M.* (1990), 241 Mont. 111, 118, 785 P. 2d 709, 713.

This Court will not reverse the District Court’s findings of fact supporting a decision to terminate parental rights and to permit adoption unless such findings of fact are clearly erroneous. *Doe*, 921 P. 2d at 878; *In the Matter of J.S. and P.S.* (1994) 269 Mont. 170, 173, 887 P. 2d 719, 720. A district court’s finding of fact is clearly erroneous if not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if, after reviewing the record, the appellate court is left with a definite and firm conviction that the district court made a mistake. *R.A.J.*, ¶ 11.

This Court will not reverse the District Court’s conclusions of law unless they reflect a mistake of law. *Doe*. 921 P. 2d at 878; *In re Adoption of C.W.D.*,

2005 MT 145, ¶ 6, 327 Mont. 301, 114 P. 3d 214; *In re Adoption of C.R.N.*, 1999 MT 92, ¶ 7, 294 Mont. 202, 979 P.2d 210.

The termination of parental rights involves a fundamental liberty interest and, consequently, an order purporting to terminate parental rights must be supported by clear and convincing evidence. *Adoption of C.R.N.*, ¶ 7. “Clear and convincing evidence in the context of a parental rights termination case exists where the evidence is definite, clear and convincing, or a particular issue is clearly established by a preponderance of the evidence or by a clear preponderance of the proof.” *Adoption of C.R.N.*, ¶ 7.

The “clear and convincing evidence” standard of review applies only to the termination of parental rights. Once this Court has reviewed whether termination of parental rights is supported by clear and convincing evidence, the Court need only examine whether the conclusion that the adoption is in the children's best interests is supported by substantial evidence. *Matter of Adoption of R.M.*, 241 Mont. 111, 118, 785 P. 2d 709, 713.

### **SUMMARY OF ARGUMENT**

1. Appellant failed to file her Notice of Appeal in a timely manner. The Notice was required to be filed within 30 days of service of the notice of the entry of the Court’s Order terminating M.C.M.’s parental rights and approving of the adoption of the children by M.C. and T.G.C. Service of notice of that Order on

M.C.M was effected on January 24, 2010. M.C.M. did not file her Notice of Appeal until March 12, 2010, some 48 days service of notice of the Order. The time limits for filing a notice of appeal are jurisdictional. Absent an appellant's compliance with the time limits, this Court has no jurisdiction to hear the appeal. Accordingly, this Court should dismiss the instant appeal.

2. Clear and convincing evidence supports the District Court's termination of M.C.M.'s parental rights for abandonment pursuant to § 42-2-608(1)(b) MCA (and § 41-3-102(1)(a) (i) and (ii)). Overwhelming, undisputed evidence shows that the children have lived almost exclusively with M.C. and T.G.C. since 2002 and that M.C. and T.G.C have been virtually the exclusive primary care givers since that time. On several different occasions since 2002, M.C.M. left the children with M.C. and T.G.C. "under circumstances that make reasonable the belief that the parent does not intend to resume care of the child in the future" (§ 41-3-102(1)(a)(i)). Overwhelming, undisputed evidence also shows that in July 2007 M.C.M. "willfully surrendered legal custody of the children for a period of 6 months and during that period did not manifest to the child and the person having physical custody a firm intention to resume physical custody or to make permanent arrangements for the care of the children" (§ 41-3-102(1)(a) (ii)). The District Court did not abuse its discretion in terminating M.C.M.'s parental rights on the ground of abandonment.

3. Clear and convincing evidence supports the District Court's termination of M.C.M.'s parental rights pursuant to § 42-2-608(1)(c) for failure to contribute to the support of the children, although able to do so, for an aggregate period of one year prior to the filing of the Petition for Termination of Parental Rights and for Adoption. Overwhelming, undisputed evidence shows that, in fact, M.C.M. failed to contribute to the support of the children, although able to do so, for an aggregate period of at least about seven years prior to the filing of the Petition. The District Court did not abuse its discretion in terminating M.C.M.'s parental rights on the ground of failure, although able, to contribute to the support of the children for an aggregate period of one year prior to the filing of the Petition.

4. Clear and convincing evidence supports the District Court's termination of M.C.M.'s parental rights pursuant to § 42-2-608(1)(d) for being in violation of a court order to support the children. The District Court entered such an Order in July 2007 in connection with the Dissolution Decree dissolving M.C.M.'s marriage to R.M., and M.C.M. has never to this day obeyed, or even attempted to obey, that Order. The District Court did not abuse its discretion in terminating M.C.M.'s parental rights on the ground of the parent's being in violation of a court order to support the children.

5. Substantial evidence (in fact, clear and convincing evidence) supports the District Court's grant of the Decree of Adoption permitting M.C. and T.G.C. to

adopt the children. Overwhelming, undisputed evidence shows that, due to the instability, drug use and general unreliability of M.C.M., M.C. and T.G.C. have been virtually the exclusive primary care givers to the children since 2002 and that the children are thriving in their care. The District Court did not abuse its discretion in determining that adoption was in the best interests of the children and in permitting M.C. and T.G.C. to adopt the children.

### **ARGUMENT**

#### **1. THE NOTICE OF APPEAL WAS NOT TIMELY FILED. THE COURT THEREFORE HAS NO JURISDICTION TO ENTERTAIN THIS APPEAL AND MUST DISMISS IT.**

As noted in Appellant M.C.M.'s Opening Brief, Appellees, M.C. and T.G.C. filed a combined Petition for Termination of Parental Rights and for Adoption on March 6, 2009. (Appellant's Opening Brief, p. 1.) On December 23, 2009, the District Court held a hearing on the Petition. *Id.* This was the only hearing the District Court held on the matter.

On January 5, 2010, the District Court entered its Order terminating M.C. M.'s parental rights and approving M.C. and T.G.C.'s adoption of the minor children.<sup>1</sup> Ex. C, Order terminating parental rights and approving adoption, January 5, 2010. Notice of Entry of that January 5, 2010 Order was served on

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<sup>1</sup> The District Court did not enter the Decree of Adoption on the same day it entered the Order terminating parental rights and approving the adoption only because some amount of time was required for T.G.C. and M.C.'s attorney to prepare the Adoption Decree and forward it to

M. C. M. on January 24, 2010. Ex. E, Notice of Entry of Judgment, filed January 25, 2010. (Appellant's Appendix to her Opening Brief fails to provide this Notice to the Supreme Court.)

The Montana Rules of Appellate Procedure require that in civil cases, notice of appeal be filed with the Supreme Court within 30 days from the date of service of notice of entry of the judgment or order that is being appealed. Rule 4 (5)(a)(i), M. R. App. P. , § 25-21-Rule 4, MCA (2009). Accordingly, M.C.M.'s Notice of Appeal from the District Court's January 5, 2010 Order terminating M.C.M.s parental rights and approving M.C. and T.G.C.'s adoption of the minors was required to be filed on or before February 23, 2010. However, M. C. M.'s Notice of Appeal was not filed until March 12, 2010, well beyond the 30-day limitations period. The Notice of Appeal was late.

The time limits for filing an appeal are jurisdictional and exclusive. *Foster Apiaries, Inc. v. Hubbard Apiaries, Inc.* (1981), 193 Mont. 156, 159, 630 P.2d 1213, 1215. An appellant is charged with the duty to perfect her appeal in the manner and time provided in Rule 4. *Id.* Absent such compliance, the Supreme Court lacks jurisdiction to hear the appeal. *Id.*, citing *Price v. Zunchich* (1980), 188 Mont. 230, 234, 612 P.2d 1296, 1298. In other words, the Constitutional right

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the Court, and, then, for the Court to sign it. The Decree of Adoption was entered by the Court on February 2, 2010. Ex. D, Decree of Adoption, February 2, 2010. Notice of Entry of the Decree of Adoption was served on M.C.M. on February 11, 2010. Ex. D, Notice of Entry of Judgment, February 11, 2010.

of appeal is secured only where the appellant follows the laws and complies with the provisions necessary to give the Supreme Court appellate jurisdiction. *Montana Power Co. v. Montana Dept. of Public Service Regulation* (1985), 218 Mont. 471, 478-79, 709 P.2d 995, 999.

Because M.C.M. failed to file her Notice of Appeal within the time required by Rule 4 of the Rules of Appellate Procedure, this Court simply has no jurisdiction to entertain the appeal and must dismiss it.

If this Court determines that it somehow has jurisdiction to hear the appeal, it is evident that clear and convincing evidence supports

**2. CLEAR AND CONVINCING EVIDENCE SUPPORTS THE DISTRICT COURT'S DETERMINATION THAT M.C.M.'S PARENTAL RIGHTS SHOULD BE TERMINATED DUE TO HER ABANDONMENT OF THE CHILDREN (§ 42-2-608 (1)(b)).**

Section 42-2-608(1)(b) authorizes the District Court to terminate a biological parent's parental rights on the grounds of "unfitness" if "the parent has willfully abandoned the child, as defined in § 41-3-102, M.C.A. . . ."

Section 41-3-102(1)(a) defines abandonment as follows:

- (i) Leaving the child under circumstances that make reasonable the belief that the parent does not intend to resume care of the child in the future; or
- (ii) Willfully surrendering legal custody for a period of 6 months and during that period not manifesting to the child and the person having physical custody of the child a firm intention to resume physical custody or to make permanent arrangements for the care of the child.

The District Court concluded that M.C.M.'s conduct with respect to the children constituted "abandonment" under both subparagraphs of § 41-3-102 (1)(a), and clear and convincing evidence supports that determination.

**a. 41-3-102(1)(a)(i)**

The District Court did not err in concluding, pursuant to § 41-3-102(1)(a)(i), that M.C.M. had abandoned the children. As noted, Section 43-3-102 (1)(a)(i) provides that "abandonment" consists of "leaving a child under circumstances that make reasonable the belief that the parent does not intend to resume care of the child in the future." The District Court concluded correctly, on the basis of the overwhelming, uncontroverted evidence, that the requirements of subparagraph (i) were satisfied.

The uncontroverted evidence unquestionably shows that, as the District Court noted (Ex. C, Order, Jan. 5, 2010, p. 4 ), the "children lived with their paternal grandmother [M.C.] for most of their lives . . ." In her Opening Brief M.C.M attempts to spin this evidence in her favor, but her effort is unavailing. Her assertion that "the testimony established that children [sic] lived on and off with M.C. and their mother until M.C.M. voluntarily granted temporary guardianship to M.C. in July 2007" (Opening Brief at 10) is misleading. It glosses over the uncontroverted fact that the evidence as to the children's living "on and off" with M.C.M. shows that from 2002 to the present, "off" has been the operative

description the vast majority of the time. In fact, the uncontroverted evidence shows that in the eight years from 2002 through October 2009 (when M.C.M. was released from prison), the children spent perhaps an aggregate total of one year living with M.C.M. and a total of **seven** years living with M.C. and T.G.C.; and that is estimating liberally in favor of M.C.M. ( See Tr. pp. 3-13.) The evidence also clearly shows that, since 2002, every single time M.C.M. attempted to retake custody of the children, she wound up giving the children back to M.C. and T.G.C. within a few weeks. Whether for reasons of drugs or simple carelessness or inattention, she simply has been unable to handle the responsibility of the children for any sustained period of time, and has proved her inability to do so repeatedly over the course of eight years. (Tr. pp. 3-13; p. 14, ll. 23-25, p. 15, ll.1-5.) Even since her release from incarceration in October 2009, M.C.M. has had custody of the children only on weekends; M.C. and T.G.C. have housed, fed, clothed and otherwise cared for the children during every week since October 2009, although M.C.M. has been out of prison, has had a job, and has had a place to live with her boyfriend. (Tr. p. 13, ll. 20-25, p. 14, ll. 1-22.) The children, now ages 8 and 10, have lived with and been cared for by M.C. and T.G.C. since they were 2 and 4 (again, with the exception of an aggregate total of perhaps one year). M.C.M.'s assertion that "the District Court erroneously found that M.C. cared for the children most of their lives" (Opening Brief at 10) is plainly incorrect. One

wonders how such an argument can honestly be advanced in the face of the overwhelming evidence to the contrary.

In any event, this evidence alone—that M.C. and T.G.C. have in fact had physical custody of and have cared for the children for seven out of the last eight years and for most of the children’s lives, and that M.C.M. has never, since 2002, maintained physical custody of the children for more than a few short weeks at a time—clearly and convincingly satisfies the requirement for “abandonment” set forth in § 43-3-102(1)(a)(i)—that the parent leave a child under circumstances that make reasonable the belief that the parent does not intend to resume care of the child in the future.

**b. § 41-3-102(1)(a)(ii)**

Clear and convincing evidence also supports the District Court’s finding that M.C.M. willfully surrendered legal custody of the children to M.C. for a period of 6 months and during that period did not manifest a firm intention to resume physical custody. In the Order terminating M.C.M.’s parental rights and approving of the adoption, the District Court specifically observed that, as part of the Dissolution Decree entered by the Court in July 2007 (dissolving the marriage of M.C.M. and her then-husband, Robert), the Court had noted that both M.C.M. and Robert had agreed that legal guardianship of the children should be given to M.C. Ex. C, Order January 5, 2010, p.2; Ex. A, Decree of Dissolution, July 3,

2007, Finding of Fact No.7. It is undisputed that from July 3, 2007, when the Dissolution Decree went into effect, until November 2007, when M.C.M. was incarcerated on drug possession and child endangerment charges, at least four months passed during which M.C.M. was not incarcerated, but during which she expressed no firm intention to resume physical custody of the children. This period of four months coupled with the first two months of incarceration, during which M.C.M. also failed to express any such firm intention, alone, satisfies the six-month requirement for abandonment under § 41-3-102(1)(a)(ii).

The evidence also shows that, as part of the Dissolution Decree, the District Court ordered that, within one year of the date of the Decree (July 3, 2007), M.C.M. could petition the Court to explain why she should regain custody. Ex. A, Decree of Dissolution, July 3, 2007, Conclusion of Law No. 4. It is undisputed that M.C.M. never filed any such petition. Thus, there is a second, separate period of (more than) six months (i.e., July 3, 2007 to July 3, 2008) during which M.C.M. failed to express any firm intention to retake custody of the children, despite an actual, formal invitation from the District Court to do.

M.C.M.'s excuse is that she could not file any such petition while incarcerated and serving her sentence for drug possession. But this is simply not true. She certainly could have filed a conditional petition (or simply written the District Court and/or M.C. and/or the children a letter) expressing her firm

intention that she would retake physical and legal custody of the children when she had finished serving her sentence. The uncontroverted evidence is that she failed to do so. Clearly, the evidence demonstrates a period of (at least) 6 months during which M.C.M surrendered legal custody of the children to M.C. and failed during that time to express any firm intention to retake physical custody.

M.C.M. is incorrect in insisting that the facts of the instant case are similar to those of *Matter of Adoption of Doe* (1996), 277 Mont. 251, 921 P. 2d 875. The two cases are distinguishable for several important reasons.

First, contrary to M.C.M.'s assertion, *Doe's* holding that "separation from a child for an extended period of time due to incarceration, whether the separation is voluntary or involuntary [does] not rise to level of abandonment" (Opening Brief at 11) is irrelevant, since, in the instant case, the District Court did not find that M.C.M.'s mere separation from the children due to her incarceration amounted to abandonment. Rather, the District Court found that M.C.M. had surrendered legal custody of the children to M.C. for a period of (at least) 6 months and had not manifested any firm intention during such 6 month period to resume physical custody or make permanent legal arrangements for the care of the children.

Second, in *Doe* this Court held that an incarcerated biological mother had not abandoned her children under § 41-3-102(1)(a)(ii) where she had willingly granted the grandmother a temporary guardianship over the children before going

to prison and had repeatedly and firmly refused to grant permanent custody to the grandmother. 921 P. 2d at 877, 879-880. A central difference between *Doe* and the instant case is that in the instant case, when M.C.M. first willingly left the children with the grandmother, M.C., in July 2007, it was not because M.C.M. needed to have someone care for the children temporarily while she served out a prison sentence (since the arrest on drug possession and child endangerment charges had not yet occurred). It was, instead, because, in the midst of the marriage dissolution process, the District Court found, and M.C.M. agreed, that M.C.M had already demonstrated to the Court that she was incapable of caring for the children and that M.C. should have, in effect, permanent legal and physical custody of the children unless and until M.C.M. could demonstrate to the District Court that she was fit to take the children back.

In other words, at the time of the Dissolution Decree, the District Court, with M.C.M.'s consent, made M.C. the legal guardian of the children. The guardianship ordered by the District Court was, in effect, permanent, conditioned on M.C.M.'s (or ex-husband Robert's) filing a petition within one year of the Dissolution Decree to regain custody. Ex. A, Decree of Dissolution, July 3, 2007, Finding of Fact Nos. 7,8, Conclusion of Law No. 4. Absent any such (successful) petition, of course, physical as well as legal custody of the children would remain permanently with M.C. and T.G.C. M.C.M. can claim that, as far as she was concerned, M.C.s

guardianship of the children was to be temporary. But the fact of the matter is that during the divorce she agreed, in effect, that M.C. would have the permanent legal and physical responsibility for the children unless and until M.C.M. could prove to the satisfaction of the Court that she was fit to care for them. And the District Court gave her a deadline of one year to make such proof (or at least to manifest the firm intention that she would take over the responsibility for the children at some point), which deadline she missed. Unlike the mother in *Doe*, M.C.M. cannot legitimately argue that the facts show that she always refused to grant permanent custody and “never assented to anything more than temporary custody . . .” *Doe*, 921 P. 2d at 877.

A third difference between *Doe* and the instant case is that while the facts of *Doe* indicate that the grandmother there was very involved in the upbringing of the children, those facts do not suggest a situation like the one currently before this Court—where the children had, in fact, lived exclusively with and been raised by the grandparents for the vast majority of their lives, and where the grandparents had, in fact, not only been the children’s primary care givers, but their exclusive care givers and de facto parents for the most of the children’s lives. Under the circumstances of the instant case, for M.C.M. to show that there is evidence that she “manifested a firm intention to resume physical custody” of the children, it is incumbent on her to do more than merely point out that from jail “she

corresponded with the children through letters and phone calls” (Opening Brief p. 11) and that she never assented to anything more than the grandmother’s temporary physical custody, even if the latter fact were true, which it is not.

Finally, as the District Court noted, M.C.M. filed an affidavit with the District Court on March 23, 2009 requesting waiver of filing fees in connection with her response to the instant Petition, and by that affidavit she indicated that she worked in Butte and earned approximately \$1,200 per month. It is undisputed that as of that date, she was sharing a house with her boyfriend, Mr. Wambolt. Yet, as discussed further in Points 3 and 4 below, she has contributed nothing to the support of the children. She has contributed nothing even after her release from incarceration in October 2009, although it is undisputed that she has been employed and earning a salary since that time. She has contributed nothing even though, in the divorce, the District Court expressly ordered her to pay half of the children’s medical, dental, etc., expenses and to contribute whatever additional funds she might be able to. In fact, she has contributed virtually nothing to the support of the children since 2002. Certainly, one way to manifest a firm intention to resume custody of your children is to start contributing to their support, especially where, as here, the District Court has already ordered you to do so as part of your divorce. (See Point 4 below.) Again, under these specific circumstances, a firm intention to resume physical custody of the children is not

manifested by occasionally writing them letters or taking their phone calls, or even by letting them stay with you on weekends. *Doe* does not help M.C.M.

In short, the District Court's finding that M.C.M. never manifested any firm intention that she would resume custody of the children is supported not only by the overwhelming, clear and convincing evidence that M.C.M. has failed **since 2002** to contribute to the financial support of the children, including after being expressly ordered to do so by the Court in July 2007, but also by the evidence that M.C.M. relinquished legal and physical custody of the children and completely ignored the District Court's one-year deadline for petitioning to resume custody. This Court has held that "[a]bandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child." *In the Matter of the Adoption of C.R.D.*(1989), 240 Mont. 106, 110, 782 P.2d 1280, 1283 (quoting *In the Matter of the Adoption of David C.* (1978), 479 Pa. 1, 387 A.2d 804, 811; *In the Matter of the Adoption of Simonton* (1982), 211 Neb. 777, 320 N.W.2d 449, 454). Moreover, "It is a fundamental principle of law, [] that parental rights do not exist without concomitant obligations. . . It is the public policy of the State of Montana that the statutes concerning the termination of parental rights should not be interpreted in favor of those who shun the burden of parental obligations." *Matter of Adoption of D.J.V.* (1990), 244 Mont. 209, 212 796 P. 2d 1076, 1078, quoting *In re Burton's*

*Adoption* (1956), 147 Cal.App.2d 125, 305 P.2d 185, 191. Applying those principles in the *Matter of P.E.* (1997), 282 Mont. 52, 934 P. 2d 206, this Court, held, in essence, that the biological mother's actions spoke louder than her words when it came to the question of whether she had manifested a firm intention to retake physical custody of her daughter. While the circumstances of the instant case and that of *Matter of P.E.* differ significantly, the point is that actions **do** speak louder than words, and the District Court is permitted to take that factor into account when deciding if the mother has genuinely manifested an intention to resume custody of the children. In the instant case, as in *P.E.*, "the record is replete with evidence to support the District Court's findings that [the mother's] efforts at reclaiming [the child] were sporadic and unsubstantial, and did not constitute a firm intention to reclaim physical custody [of the child]. These findings are not clearly erroneous . . ." *P.E.*, 282 Mont. at 934 P. 2d at 210. Therefore, this Court should affirm the decision of the District Court that M.C.M. abandoned her children and that her parental rights should be terminated.

**3. CLEAR AND CONVINCING EVIDENCE SUPPORTS THE DISTRICT COURT'S DETERMINATION THAT M.C.M.'S PARENTAL RIGHTS SHOULD BE TERMINATED BECAUSE SHE HAS FAILED TO SUPPORT HER CHILDREN (§ 42-2-608(1)(c))**

M.C.M. grounds her argument that the District Court erred in concluding that her parental rights should be terminated under § 42-2-608(1)(c) for her failure

to support the children primarily on the assertion that the District Court is not authorized to “[go] back to 2002” and that “anything earlier than 2008 is . . . beyond the scope of the District Court’s inquiry” in determining whether she contributed to the children’s support. (See Appellant’s Opening Brief, p. 14.) This is an incorrect statement of Montana law. Section 42-2-608(1)(c) provides that parental rights may be terminated for purposes of making a child available for adoption if “it is proven to the satisfaction of the court that the parent, if able, has not contributed to the support of the child for an **aggregate period** of 1 year before the filing of a petition for adoption” (emphasis added).

Appellant bases her assertion that the District Court was not permitted to look back beyond 2008 on language found in *Doe, supra*, 277 Mont. 251, 921 P. 2d 875. In *Doe* this Court states that in determining whether parental rights should be terminated on the ground of parental failure to contribute to the support of the children, the district court must undertake a two-tiered analysis consisting, first, of determining whether the parent “failed to contribute to the support of the children during a period of one year prior to the filing of the petition,” and second, whether the parent “had the ability to contribute to the support of the children during that year.” *Doe*, 277 Mont. at 260, 921 P. 2d at 880. However in *Doe*, this Court was interpreting, not the current adoption statute, but its predecessor. The particular section of the adoption statute which included that “one year” language and on

which the *Doe* decision was based, § 40-8-111, MCA, was repealed in 1997 and replaced with the current section, § 42-2-608. *See*, Laws 1997, ch. 480, § 71.

It is the current section, of course, on which the District Court based its decision and with which we are concerned here. As noted, the current section provides that the court must determine whether **an aggregate period** of 1 year exists prior to the filing of the Petition during which the parent was able to but failed to contribute to the support of the children. § 42-2-608 (1)(c). Interestingly, M.C.M quotes § 42-2-608 (1)(c) in her Opening Brief, yet grounds her appeal on *Doe*'s discussion of the repealed, predecessor statute. (*See* Appellant's Opening Brief at pp. 12-13.)

Clearly, an “**aggregate period** of one year” is not the same thing as a “period of one year.” In *In re Adoption of C.W.D.*, 2005 MT 145, 327 Mont. 301, 114 P.3d 214, this Court upheld the district court's determination that the biological father, although able to contribute to the support of his children for an aggregate period of one year preceding the filing of the petition, had failed to do so and was therefore unfit to be a parent. The petition for termination of the father's parental rights and for adoption (by the stepfather) was filed on April 4, 2003. *C.W.D.*, ¶ 4. On appeal the father admitted that he had failed to provide support for the children for an aggregate period of one year prior to April 4, 2003. *C.W.D.* ¶ 11. However, he disputed the district court's determination that he had been able

to provide support for that aggregate period of one year. *Id.* He asserted that the evidence adduced at the hearing failed to prove that he had been able to provide support at any point prior to July 1, 2002. He argued, in other words, that he had been able to provide support only since July 1, 2002, a period of only nine months prior to the filing of the petition. *Id.* In light of the father’s argument, this Court stated, “We focus, therefore, on whether the record contains evidence that [the father] failed to provide support for the children although able to do so during **any** three months prior to July of 2002, to establish the aggregate one-year period required by § 42-2-608(1)(c), MCA.” *C.W.D.*, ¶ 12 (emphasis added). Thus, in interpreting “aggregate,” this Court found that **any** three months during the children’s lifetime could be examined to determine whether, during each of those months, the father had been able to contribute to the support of the children but had not contributed. Any such month discovered could then be added to the nine-month period for which the father had conceded he had been able to contribute—i.e., July 1, 2002 to April 4, 2003. (Finding that the record did contain such evidence, this Court upheld the district court’s determination that the father was unfit, that his parental rights should be terminated and that the stepfather should be permitted to adopt the children. *C.W.D.*, ¶¶ 12-14.)

Unquestionably in the instant case, § 42-2-608 (1)(c) authorizes the District Court to “go back to” 2002 in determining whether M.C.M was able to contribute

to the support of the children and whether she had done so. Thus, even if it is assumed for the sake of argument that as of November 2007 when she was sent to prison, M.C.M. completely and forever thereafter lost the ability to contribute to the support of the children (which, in fact, she did not), the evidence still shows that M.C.M. had been able to contribute to the support of the children but had failed to do so for an **aggregate period of at least five years** prior to the filing of the Petition (six years from 2002 to 2007 inclusive, minus a total period of one year during 2002-2007 that the children spent with M.C.M, estimating liberally in favor of M.C.M.).<sup>2</sup>

M.C.M. also contends that the District Court erred by failing to apply the fourth factor of the *Doe* test for determining a parent's ability to contribute support (parent's use of his or her funds to obtain only the bare necessities of life. *Doe*, 277 Mont. at 259, 921 P. 2d at 880). This argument, too, must fail. M.C.M. argues that because she was incarcerated, "she was not really making any money and couldn't be sending anything out" (Opening Brief, p. 7) and that the District Court

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<sup>2</sup> M.C.M. also asserts that the District Court's finding that M.C.M. provided no contribution to the children from 2002 onward is erroneous because "the children resided on and off with M.C.M. during most of the years between 2002 and 2007. . ." Opening Brief, p. 14. Apparently, the argument is that if the children sometimes resided with M.C.M., she must necessarily have been contributing some financial support to them at those times, and therefore cannot be found to have "provided no contribution." Again, however, this argument must fail under a correct interpretation of § 42-2-608 (1) (c). Clearly, even given that the children sometimes resided with M.C.M., there exists an aggregate period of far longer than one year prior to the filing of the Petition during which M.C.M. failed to contribute anything to their support .

failed to consider this fact. (Opening Brief, p. 7). It is undisputed that as of March 2009, M.C.M. was earning \$1,200 per month because she swore under oath to earning that amount when she filed an affidavit in the instant action requesting waiver of her filing fees. Ex. C, Order January 5, 2010, p. 5. Apparently, her contention is that all such earnings she made from jobs she held under the supervision of the Department of Corrections—like her current job as a cook at the Freeway Tavern in Butte and other jobs she held in 2008 and 2009 (Town Pump, Hampton Inn, 4-B's)—necessarily went to pay for her room and board at a halfway house or some such thing, and that nothing was left over to contribute to the support of the children. However, she provided no evidence as to where any of the earnings from these jobs actually went except for her conclusory assertion that she “couldn’t be sending anything out.”

And, even assuming for the sake of argument that such a contention is true, it is immaterial.<sup>3</sup> There still exists the aggregate period discussed above—the

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<sup>3</sup> Nor does such a contention explain why M.C.M. has failed to contribute any support to the children (other than when they spend a weekend with her) since her release from incarceration in October 2009. Opening Brief, p. 7. Although failure to contribute any support since October 2009 would not “count against” M.C.M. where the § 42-2-608 (1)(c) analysis is concerned, it is nevertheless another indication that M.C.M. has abandoned the children. As the District Court noted in concluding that M.C.M. had abandoned the children, “after this Court’s decree in [M.C.M.’s] divorce was entered in July 2007, [M.C.M.] never manifested any indication that she would retake custody of the children.” Ex. C, January 5, 2010 Order, p. 4 (emphasis added). Had M.C.M. truly desired to retake custody, she could have been contributing to the children’s support since October 2009, when she has been out of prison and living with her boyfriend “in a really nice place in Butte.” Opening Brief, p. 4.

period of at least five years prior to the filing of the Petition during which M.C.M. failed to contribute any support to the children despite her ability to do so.

In short, M.C.M.'s excuses for why she failed to contribute to the support of the children do not hold up under scrutiny. Her contention that the District Court erred in applying § 42-2-608 (1)(c) is based on an incorrect reading of Montana law as well as on the unsupported and incorrect assertion that incarceration prevented her from contributing anything at all to the children's support from November 2007 to the present. The District Court's finding that M.C.M, although able, failed to contribute to the support of the children for an aggregate period of one year prior to the filing of the Petition is supported by overwhelming, clear and convincing evidence. That finding is certainly not clearly erroneous. Given the evidence, the District Court's conclusion that, M.C.M's parental rights should be terminated pursuant to § 42-2-608(1)(c), and that the children should be adopted by M.C. and T.G.C. was, unquestionably, a proper exercise of the Court's discretion

**4. CLEAR AND CONVINCING EVIDENCE SUPPORTS THE DISTRICT COURT'S DETERMINATION THAT M.C.M'S PARENTAL RIGHTS SHOULD BE TERMINATED BECAUSE SHE IS IN VIOLATION OF A COURT ORDER TO SUPPORT THE CHILDREN (§ 42-2-608(1)(d)).**

For the reasons discussed in Point 3 above, the District Court also correctly found that M.C.M. was in violation of the July 2007 Dissolution Decree, which expressly directed her to contribute 50% of the children's medical, dental, optometric and pharmaceutical expenses, as well as such additional funds "as she

was able.” Ex. A, Decree of Dissolution, July 3, 2007, Finding of Fact No. 8, and Decree, No. 3. Section 42-2-608(1)(d), MCA, provides the authority for termination of parental rights for purposes of making a child available for adoption when “it is proven to the satisfaction of the court that the parent is in violation of a court order to support [the children].”

Again, M.C.M.’s excuse for contributing nothing and thus violating the Dissolution Decree is that she was incarcerated from November 2007 to October 2009. Again, even assuming that incarceration somehow prevented M.C.M. from providing the children with at least some small part of the earnings from her Freeway Tavern job and other jobs (which is, again, a totally unsupported contention on M.C.M.’s part), incarceration does not explain why, since her release in October 2009, M.C.M. has failed to contribute 50% of the children’s medical and other health expenses, and why she has failed to contribute other funds, and why she has thus continued to violate the Dissolution Decree, even when not incarcerated. M.C.M. argues that she “testified that since she has been released, she does provide support for the children when they are with her [i.e., on weekends].” Opening Brief at 15. However, this is not enough. When a parent is unable to pay his or her entire child support obligation because of financial hardship, the parent is still obligated to make a diligent effort to comply with the court’s decree and make whatever payments are possible under the

circumstances. *Matter of Adoption of R.M.* (1990), 241 Mont. 111,117, 785

P.2d 709, 713. M.C.M.'s assertion that "she does provide support for the children when they are with her" is nothing more than an admission that she is continuing to fail to provide the level of support required by the Dissolution Decree and is in continuing violation of the Decree. It does not in any way show that the Court's finding of a violation of the Dissolution Decree was erroneous; in fact, it confirms that the Court's finding was correct.

Nor does the incarceration excuse explain why M.C.M. violated the Dissolution Decree by failing to contribute anything to the support of the children from July 2007, when the Dissolution Decree was entered, to November 2007, when her prison term began.

In sum, the evidence is clear, convincing and overwhelming that M.C.M. violated the Dissolution Decree by failing to contribute 50% of the children's health expenses since July 2007 and by failing to provide additional funds as she was able. Even assuming *arguendo* that M.C.M.'s incarceration from November 2007 to October 2009 entirely excuses her continuing violation of the Decree during that entire period of time (which it does not), it cannot excuse the violations of the Decree that occurred before November 2007 or that have occurred since October 2009 and that continue to the present. Based on the overwhelming evidence, the District Court was clearly well within its discretion in finding that

M.C.M. has been and continues to be in violation of the Dissolution Decree and in concluding that, pursuant to § 42-2-608(1)(d), M. C. M.'s parental rights should be terminated

**5. SUBSTANTIAL EVIDENCE SUPPORTS THE DISTRICT COURT'S APPROVAL OF THE ADOPTION OF THE CHILDREN BY M.C. AND T.G.C.**

M.C.M.'s argument that the District Court erred in waiving a pre-placement evaluation prior to entering the Adoption Decree must fail. M.C.M. apparently contends that because § 42-3-212 MCA provides for waiver only when the child is placed directly with "an extended family member of the child" and because only M.C. (the children's paternal grandmother), not T.G.C., qualifies as such "an extended family member," waiver was inappropriate. Such an argument, however, reads into the statute provisions that are not there.

In other words, § 42-3-212 provides that "In a direct parental placement adoption [i.e., one which, as here, occurs independently of any state agency—*see* § 42-1-103 (10)], if the court is satisfied that adoption is in the best interests of the child, the court may waive the requirement of a preplacement and postplacement evaluation when a parent or guardian places a child for adoption directly with an extended family member of the child." This is exactly what occurred in the instant case: M.C.M. placed the children with M.C., the children's grandmother. Opening Brief at 16. If M.C.M.'s argument is that § 42-3-212 did not permit the District

Court to waive the preplacement report because T.G.C., the children’s step-grandparent (as opposed to biological grandparent), was also in the picture, then M.C.M. is arguing that § 42-3-212 says, or must be interpreted as saying, that the court may waive the preplacement evaluation only when the child is placed directly with an extended family of the child “who, if married, is married to another extended family of the child” (or, “who, if married, is married to another biological ancestor of the child” or some such thing.)

First, of course, § 42-3-212 does not include such language. Second, of course, it would be absurd if the statute did include such language, or was susceptible to such an interpretation, because, in practical effect, it would mean that waiver of the preplacement evaluation could never occur where the extended family member has ever been divorced and remarried. No reasonably conceivable rationale could support such an interpretation of § 42-3-212.

M.C.M.’s contention that the District Court erred in waiving the preplacement report, as well as her concomitant assertion that a guardian ad litem should have been appointed for the children is silly in any event. The purpose of a preplacement evaluation is to determine an adoptive parent’s “fitness and readiness as an adoptive parent.” § 42-3-201 (1). The purpose of appointing a guardian ad litem would have been essentially the same—that is, to insure that the children’s best interests would be served by the adoptive parents. The **uncontroverted**

evidence was that M.C. and T.G.C. have already been raising the children for most of the children's lives. The children are currently 10 and 8 years old. Since 2002, except for an aggregate period of perhaps one year, the children have been in the exclusive care of M.C. and T.G.C. This means that since the ages of 4 and 2 respectively, the children have been raised by M.C. and T.G.C. (See Tr. p. 3, ll. 7-18). The uncontroverted evidence was that the children are healthy and thriving under M.C. and T.G.C.'s care. The uncontroverted evidence was also that, when M.C.M. took the children (which, in any event, occurred only on a "week here, two weeks there" basis (See Tr. p. 4, ll. 11-25, p. 5, ll.1-3)), the children wound up neglected, hungry and in danger. (See, e.g., Tr. p. 6, ll. 13-25; p.7, ll. 1-3; pp. 8-9). (The District Court was already aware of much of this evidence as a result of the divorce proceedings between M.C.M. and the children's father, which had occurred in the same Court in July 2007. As discussed, at that time, the District Court awarded M.C. legal guardianship of the children precisely because M.C.M. was unfit to care for them, and because M.C. had already been caring for them and it was in their best interests that M.C. continue to care for them.)

M.C.M.'s assertion that "the only evidence before the Court was the children's mid-quarter grades and self-serving testimony of M.C. and T.G.C." (Opening Brief at 17) is incorrect and misleading. Additional evidence included the fact that the children have resided with and been taken care of continuously by

M.C. and T.G.C. since 2002, with the exception of periods of a few weeks here and there. M.C. M. could have disputed M.C.'s testimony to this effect if she honestly believed it were untrue, but she did not. It is simply uncontroverted that the children have been raised largely by M.C. and T.G.C.

The evidence also included the fact T.G.C. and M.C. have repeatedly rescued the children from unhealthy and/or unsafe situations that have developed on nearly every occasion they spent any time with M.C.M. These include instances of: rescuing the children from South Carolina where M.C.M. had taken them at some point in 2005, after M.C.M.'s father reported to M.C. that the children were "being neglected, running up and down the street with no clothes on," and "in danger." (Tr. p. 6, ll. 9-25, p. 7., ll.1-21); rescuing the children in May 2006 from a farm house in which they'd been living with M.C.M. where there was "a lot of debris and filth" and where, "when [M.C. and T.G.C.] picked up the kids, they were in shorts, and they had no coats and there was snow on the ground." (Tr. p. 8, ll.13-25; p.9, ll.1-25); rescuing the children in April 2007 when M.C.M and her then-boyfriend, Keith, were arrested for drug possession and child endangerment (Tr. p.10, ll.3-25, p.11, ll. 1-7); and rescuing the children in July 2007 when M.C.M. was divorced from her husband, Robert, and when the District Court found that neither Robert nor M.C. was fit to parent the children at that time. ( Tr. 11, ll.18-25, p. 12, ll. 1-2.) M.C.M. could have disputed any or all of M.C.'s

testimony about these facts, but she disputed none of it. Again, then, this evidence is absolutely uncontradicted.

And, if M.C.'s testimony was self-serving, so was M.C.M.'s. M.C.M.'s present assertion that "there was evidence [contrary to that of the children's receiving good grades while under the care of M.C. and T.G.C.] supporting [M.C.M.'s] abilities as a parent and recommending that the children reside with her" is misleading. All such evidence was utterly self-serving, and, in any case, did not in fact support M.C.M.'s abilities as a parent and did not recommend that the children reside with her. The only evidence M.C.M. presented with regard to her "abilities as a parent" was her testimony that she had taken a parenting course at Elkhorn Treatment Center at some point during the period of her 2007-2009 incarceration. (Tr. p. 30, ll. 1-4.) The only evidence she presented "recommending that the children reside with her" was her own testimony that the children wanted to reside with her. (Tr. p. 33, ll. 2-5.) She argues in the Opening Brief that she "introduced letters of recommendation into evidence regarding her character and parenting" (Opening Brief at 6), but her testimony concerning these letters indicates only that they were letters from two people "who have **worked with me professionally** and know me." (Tr. p. 32, ll. 11-21 (emphasis added).) She has not appended the letters as exhibits to her Opening Brief. If either of the letters in any

way concerned her “parenting abilities” they were, by her own admission, not based on the writer’s first-hand knowledge of those purported abilities.

Clearly, the District Court did not err in waiving a preplacement evaluation of M.C. and T.G.C. or in not appointing a guardian ad litem. The Court was authorized by § 42-3-212 to waive the preplacement evaluation since M.C. concededly qualifies as an “extended family member.” And the uncontroverted, overwhelming evidence shows that M.C. and T.G.C. were already the longtime, de facto parents of the children and were doing an excellent job of raising them. Substantial evidence supports the District Court’s determination that the children should be adopted by M.C. and T.G.C.

### **CONCLUSION**

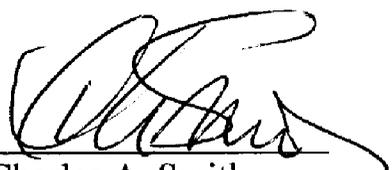
Clear and convincing evidence supports the District Court’s determination that M.C.M.’s parental rights should be terminated because she abandoned the children and because she failed to contribute to their support although she was able to do so and was under an ordinary parental obligation to do so as well as an express District Court Order to do so. Each of these grounds alone—abandonment or failure to support—supports the termination of her parental rights.

Substantial evidence, indeed clear and convincing evidence, also supports the District Court’s Decree that the children be adopted by M.C. and T.G.C. M.C. and T.G.C. have clearly provided a very stable and loving home environment for

the children for the vast majority of the children's lives. Indeed, M.C. and T.G.C. have functioned all these years as the children's true parents.

As the District Court noted, "It appears that for the last seven years, [M.C.M.] has put her parental duties on hold and now asks this Court and the children to allow her to resume parenting. While [M.C.M.] can certainly argue it is in her best interests to get the children back, it cannot be said that it is in the children's best interests for her to resume parenting." Ex. C, Order, January 5, 2010, p. 6. This Court should affirm the District Court's January 5, 2010 Order terminating M.C.M.'s parental rights and approving of the adoption of the children by their paternal grandparents and the District Court's February 2, 2010 Decree of Adoption.

DATED this 16 day of June, 2010

By   
Charles A. Smith

Attorney for Appellees

CERTIFICATE OF SERVICE

I, CHARLES A. SMITH, hereby certify that the foregoing was duly served upon the respective attorneys for each of the parties entitled to service by depositing a copy in the United State Mail postage prepaid, address to each at the last known address as shown on this page on the 21 day of June, 2010.

Lori A. Harshbarger  
JD Law Firm, P.C.  
336 Waterloo Road  
Whitehall, MT 59759

A handwritten signature in black ink, appearing to read 'C.A. Smith', written in a cursive style.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Time New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Word is not more than 10, 000 words (9,867 words), not averaging more than 280 words per page, excluding Certificate of Service and Certificate of Compliance.

By   
Charles A. Smith